Essex Valley Visiting Nurses Association *and* Health Professionals and Allied Employees, Local 5122. Case 22–CA–28315

March 6, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On December 17, 2008, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified[2] and to adopt the recommended Order as modified and set forth in full below.[3]

Amended Conclusions of Law

Substitute the following for Conclusion of Law 1.

"Respondent Essex Valley Visiting Nurses Association is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act."

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The Respondents have excepted to the judge's finding that, for purposes of this litigation only, they conceded that Essex Valley Visiting Nurses Association (EVVNA) and New Community Corporation (NCC) constituted a single-integrated business enterprise and a single employer within the meaning of the Act. We find merit in this exception. Contrary to the judge's finding, the record establishes that counsel for the General Counsel and the Respondents stipulated at the hearing that EVVNA satisfied the Board's jurisdictional standards and was an employer engaged in commerce within the meaning of the Act. Thereupon, counsel for the General Counsel withdrew the allegations of the complaint alleging that EVVNA and NCC were a single employer. Thus, EVVNA is the sole respondent in this proceeding. We shall modify the Conclusions of Law and caption accordingly.

[3] For the reasons set out at fn. 2 above, we shall modify the judge's recommended Order and notice to delete any reference to NCC as a respondent and as a single employer with EVVNA. We shall also modify the recommended Order and notice to conform to the Board's standard remedial language.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Essex Valley Visiting Nurses Association, East Orange, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Health Professionals and Allied Employees, Local 5122 by failing and refusing to timely provide the Union information that is relevant and necessary to the performance of its duties as the exclusive collective-bargaining representative of the bargaining unit employees.

(b) Refusing to bargain collectively with the Health Professionals and Allied Employees, Local 5122 by failing and refusing to timely respond to the Union's requests to meet and bargain in good faith for the purpose of negotiating a successor collective-bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, timely provide the Union with information that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time (including regular per diem) Registered Nurses and Licensed Practical Nurses employed by the Respondent EVVNA at its East Orange, New Jersey facility, but excluding all office clerical employees, managerial employees, confidential employees, guards and supervisors as defined in the Act, and all other employees.

(b) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the bargaining unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) Within 14 days after service by the Region, post at its facility in East Orange, New Jersey, copies of the attached notice marked "Appendix."[4] Copies of the

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 20, 2008.

(d) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix,[5] at its own expense, to all full-time and regular part-time (including regular per diem) registered nurses and licensed practical nurses who were employed by the Respondent at its East Orange, New Jersey facility at any time from the onset of the unfair labor practices found in this case until the completion of these employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 6, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain collectively with the Health Professionals and Allied Employees, Local 5122 by failing and refusing to timely provide information that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of the bargaining unit employees.

WE WILL NOT refuse to bargain collectively with the Health Professionals and Allied Employees, Local 5122 by failing and refusing to timely respond to the Union's requests to meet and bargain in good faith for the purpose of negotiating a successor collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, timely provide the Health Professionals and Allied Employees, Local 522 with information that is relevant and necessary to its duties as the exclusive collective-bargaining representative of the bargaining unit employees.

WE WILL, on request, bargain in good faith with the Health Professionals and Allied Employees, Local 5122 as the exclusive representative of the bargaining unit employees by timely responding to the Union's requests to meet and bargain.

ESSEX VALLEY VISITING NURSES ASSOCIATION

Benjamin W. Green, Esq., for the General Counsel.
Alex Tovitz, Esq. and *Ian Weinberger, Esq. (Jasinki & Williams),* of Newark, New Jersey, for the Respondent.
Carlton Levine, Staff Representative, for the Union.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Newark, New Jersey, on October 7, 2008. The charge was filed April 9, 2008,[1] and the complaint issued June 19. The Health Professionals and Allied Employees, Local 5122 (the Union) charges that Essex Valley Visiting Nurses Association (EVVNA) and New Community Corporation (NCC), as a single employer and collectively referred to as the Respondent, have been engaging in unfair labor practices in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing to acknowledge and respond to the Union's requests for bargaining dates and information. For purposes of this litigation only, the Respondent concedes that EVVNA and NCC constitute a single integrated business enterprise and a single employer within the meaning of the Act. However, the Respondent denies the allegations and contends it promptly scheduled the initial bargaining session, as well as promptly and continuously providing information to the Union since the commencement of bargaining.

At the trial, the administrative law judge denied the General Counsel's late motion to amend the complaint to allege that the Respondent failed and refused to meet and bargain with the Union at reasonable times after May 7, the date plead in the complaint. In his brief, the General Counsel moves for reconsideration of the motion. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

NCC, a community development company that owns and controls both profit and nonprofit organizations and health care agencies, and EVVNA, a home care agency, are New Jersey corporations with offices and places of business located in Newark, New Jersey, where they annually derive gross revenue in excess of $250,000 and purchase and receive goods and materials valued in excess of $50,000, directly from suppliers located outside the State of New Jersey. NCC and EVVNA, as a single employer, have been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent operates a home health care business located in Newark, New Jersey. Its home health care workers consist of full-time and regular part-time registered nurses and licensed nurse practitioners. Jackie Clay was the Respondent's human resources director during the relevant time period. Previously, the Respondent was represented during collective bargaining by David Jasinski, a partner at the law firm of Jasinski and Williams, P.C. Alex Tovitz, an associate in that firm, was assigned as the Respondent's chief negotiator on April 14, 2008.

The Respondent's nursing employees, including regular per diem employees, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act (the Unit). The Union, on behalf of the Unit, entered into a collective-bargaining agreement with the Respondent for the period of March 15, 2005, through April 30, 2008. That term was extended through October 31, 2008. Carlton Levine, a union staff representative, was the Union's lead negotiator for the 2008 negotiations with the Respondent. The Union's bargaining committee consisted of Mr. Levine and three employees from the bargaining unit: Sherry Wilson (the Union Local's president); Diane Hawke, and Olga Forrest.

In a letter, dated January 29, Levine notified Clay, with a copy to Jasinski that the Union intended to modify the collective-bargaining agreement. He also referred to an enclosed copy of the required notice sent to the Federal Mediation and Conciliation Service. Levine also notified the Federal Mediation and Conciliation Service and the New Jersey State Board of Mediation that the Union was seeking a modified successor agreement. The Respondent did not respond to the Union's January 29 letter.[2]

B. The Union's February 14 Information Request

On February 14, 2008, Levine sent Clay the information request at the heart of this case:

> Based on the right to information provided by the National Labor Relations Act, the Union requests the following information (see attached sheets) in order to provide adequate representation to our members in the upcoming contract negotiations.
>
> Please note, that unless otherwise specified, these information requests are being made on behalf of the Registered Nurse and Licensed Practical Nurse bargaining unit.
>
> This request is made without prejudice to the union's right to file subsequent requests. Please provide the information by March 3, 2008. If any part of this letter is denied or if any material is unavailable, please provide the remaining items as soon as possible, which the union will accept without prejudice to its position that it is entitled to all documents and information called for in the request.
>
> If you believe that any of the material requested is unavailable, please contact me immediately.[3]

[1] All dates are in 2008 unless otherwise indicated.

[2] The parties did not dispute that all correspondence was sent and received on or shortly after the dates indicated thereon. (GC Exh. 2–4; Tr. 6, 13–16, 20, 54–55.)

[3] The Respondent does not deny that Clay received this information request. (GC Exh. 6; Tr. 17–19.) Unfortunately, the collective-bargaining agreement was not offered as evidence, so there is no indication as to whether someone other than Clay was designated as the person to whom notice was to be given under the terms thereof.

Attached to the February 14 letter was a 'List of Requested Items" (the List). Section A of the List sought information for three items under "Financial and other General Information." Section B sought information for 12 items under "Bargaining Unit Information – Salaries, Benefits and Working Conditions."

C. The Respondent Fails to Acknowledge the Request for Nearly 2 Months

On March 21, not having received a response to the February 14 letter, Levine sent another letter by certified mail and email, addressing in part, the outstanding information request. This time, Jasinski was copied on the correspondence:

> As you are aware, the current collective bargaining agreement between [the Respondent and the Union] expires on April 30, 2008. [The Union] requests that we commence negotiations as soon as possible. We are available any day of the week of March 31 and every day the following week.
>
> Please advise as to your availability and the location for these negotiations. Further, I have not received a response to my request for information mailed to you on February 14, 2008; please let me know when that information will be provided.[4]

On April 1, Levine sent an email to Clay and Jasinski reminding them that he had not heard from either of them regarding the Union's March 21 letter requesting bargaining dates and the February 14 information request. Clay replied by email in about an hour, apologized, and assured Levine she would contact Jasinski and get back to Levine "immediately." About 20 minutes later, she emailed Levine with a request for "a copy of the letter requesting information referred to below." Less than an hour later, Levine responded by attaching another copy of the February 14 information request. On April 2, Clay replied that she "will begin pulling this information right away."[5] On April 4, Levine placed a telephone call to Jasinski, but Jasinski was not available and he left a message. Jasinski did not return Levine's call. On April 8, Levine discussed this matter with a Federal mediator.[6] On April 9, still not having heard from Jasinski, the Union filed the instant charge.[7]

On April 14, Tovitz placed a telephone call to Levine informing him that he was assigned as the Respondent's counsel for collective bargaining. Levine returned Tovitz' call on April 15. They agreed to schedule a meeting within the next 3 weeks and Tovitz said he would speak to the Respondent about responding to the February 14 information request. Tovitz followed up on their conversation with a letter sent by regular mail on April 16, and facsimile transmission on April 17. In the letter, he confirmed representation of the Respondent, a bargaining session to be held on May 7, at 3:30 p.m., and extension of the contract through May 31. Tovitz added that "[w]e will forward you the information in response to your request under separate cover." On April 17, Levine sent Tovitz a written response by facsimile transmission and certified mail. Levine agreed to the proposed bargaining date and time, asked for work releases for the Union's bargaining unit employee negotiators, and enclosed a partially executed agreement extending the terms of the contract through May 31. In conclusion, Levine added that "[w]e look forward to receiving the requested information soon as you indicated on the phone yesterday."[8]

D. The Respondent Begins to Provide Information on April 23

On April 18, Tovitz returned the executed copy of the MOU extending the term of the contract, but with a revised retroactivity provision. In addition, he provided a partial response to the February 14 information request:

> In response to your request for bargaining unit information, we enclose a current list of the employees in the bargaining unit, rate of pay, hire date, date of birth, job title, and status. We will forward you additional information under separate cover.[9]

The proposed revision of the retroactivity provision did not sit well with Levine and he rejected it in his letter dated April 23. Levine concluded by noting that, "contrary to your letter, no bargaining unit information was received either via facsimile or via regular mail." Tovitz replied the same day by enclosing "the bargaining unit information inadvertently omitted" from his April 18 letter and again noting that he would be forwarding "additional information in response to your request under separate cover." The information consisted of a chart setting forth the names of 20 employees, their rates of pay, hire dates, dates of birth, classifications, and status.[10]

On April 24, Tovitz disagreed with Levine's position on retroactivity, but indicated the Respondent's willingness to extend the contract without retroactivity. On April 28, Levine responded to Tovitz' April 24 letter by reluctantly agreeing to the Respondent's proposal to extend the contract pending negotiations and enclosing a partially executed revised contract extending the term through May 31. Levine also acknowledged receipt of the bargaining unit list en-

---

Lacking any evidence to the contrary, Clay was a suitable designee for the Respondent upon whom to serve notice under the collective-bargaining agreement. The Respondent's well-prepared and aggressive counsel confronted Levine as to why he did not copy Jasinski on the February 14 letter, but did not contest Levine's response that copying Jasinski was unnecessary. (Tr. 55–56.) It is reasonable to assume, therefore, that the collective-bargaining agreement simply required notice to the Respondent's place of business.

[4] GC Exh. 7; Tr. 56–57.

[5] GC Exh. 8; Tr. 22–23, 25, 58.

[6] I based this finding on Levine's credible and unrefuted testimony. However, I did not permit testimony as to the substance of Levine's conversation with the Federal mediator, since neither Jasinski nor the mediator was called as a witness. (Tr. 25–26.)

[7] GC Exh. 1(a).

[8] Tovitz and Levine provided consistent versions of their discussion on April 15. (Tr. 31–33, 86–87; GC Exh. 10–11.)

[9] GC Exh. 12.

[10] GC Exh. 13–14.

closed with Tovitz' April 23 letter and looked "forward to receiving the remaining information initially requested on February 14." On April 29, Tovitz returned the executed agreement to Levine extending the terms of the collective-bargaining agreement through May 31.[11]

On April 30, Tovitz provided Levine with additional information responsive to the February 14 information request: a list of the bargaining unit employees containing total hours worked in 2007, total earnings in 2007, medical coverage (if any), monthly contribution rates, a list of the Respondent's board of directors, current health plan coverage, health insurance premium cost, dental coverage, and 2007 new hire bonuses.[12]

Levine responded the same day by thanking Tovitz for providing partial information in response to the February 14 information request. He wrote, however, that most of the information had neither been provided nor denied. Levine enclosed a marked up version of the requested information list to illustrate what information was still outstanding: The outstanding items consisted of the following information relating to bargaining unit employees: years of credited experience; scheduled hours per week; total hours worked; regular hours worked for "PD" employees; overtime hours worked; weekend hours worked; employee payments for health and/or dental insurance; amount of sick time accrued but not used; average hourly wage rate for employees in each classification; for health plan coverage, the total monthly cost of premiums; the Respondent's total health insurance costs in 2007; total monthly premium costs for each type of dental coverage; number of bargaining unit members with each type of coverage; annual costs for 2006–2007 overtime pay, holiday pay, vacation pay, tuition reimbursement, continuing education costs, workers compensation costs and agency nurses; the total number of FTEs in the agency's table of organization for each bargaining unit position; the vacant positions in each job title as of January 1, 2007, and January 1, 2008; Summary Plan descriptions for the Respondent's health insurance, dental insurance, and other fringe benefit plans; the annual cost and number of employees receiving the new hire bonus for 2006.[13]

E. The Union Rejects the Respondent's Request to Withdraw the Charges

Tovitz responded by calling Levine on May 1. He requested the Union withdraw its unfair labor practice charge because a bargaining date had been scheduled and he was in the process of compiling the information. Levine refused to withdraw the charge, but noted a willingness to withdraw it after the parties entered into a new contract.[14]

On May 2, Tovitz provided the summary plan description for Horizon Blue Cross Blue Shield of New Jersey and the most recent unaudited financial report for 2007. He disagreed, however, with Levine's assertion that most of the requested information had not been provided:

> In response to your letter of April 30, 2008, you indicate that most of the information has not been provided to you. This is simply incorrect. We have provided you with most, if not all, of the relevant data for the Union to effectively negotiate this contract. Moreover, several of the items you have labeled as "not provided" are easily ascertainable from the bargaining unit already provided to you. Specifically, we ask that you revisit your requests Nos. 2 (Average hourly rate) and 9 (total number of Full Time Equivalent) in light of the data you have already received. We will address your other questions at the bargaining table.
>
> If you have any further questions, do not hesitate to contact me directly. Otherwise, I look forward to commencing contract negotiations next week that balances the needs of the Respondent, our employees, and our patients.[15]

On May 6, Tovitz provided Levine with copies of bills indicating monthly health insurance costs to the Respondent of $14,179.86 in September 2006 and $18,674.53 in August 2007. He also noted the significance of such information because it revealed an increase of the Respondent's health care costs of more than 20 percent than the previous year.[16]

F. Bargaining Commences on May 7

The parties' initial bargaining session was held on May 7, 2008. At that meeting, the Union presented its initial proposals, which lacked economic proposals, including wages and benefits. During that meeting, Levine also revisited the Union's February 14 information request, stating specifically which items had been provided and those still outstanding. Tovitz provided a copy of the EVVNA Board of Directors list, but Levine insisted on production of a similar list for the NCC. Tovitz said he would consider that request, provide a more legible copy of a health insurance bill, and provide the rest of the outstanding information. The meeting concluded with a discussion about subsequent meeting dates.[17]

Tovitz followed up by calling Levine on May 8. He informed Levine the Respondent would not provide a counterproposal until the Union submitted its economic proposal. Levine responded that the Union would not be able to do that, as it did not yet have the information necessary to make an "informed proposal in those areas." At Tovitz' request, Levine then provided clarification as to the outstanding information and agreed to follow up with another letter.[18] After their conversation, Tovitz sent Levine a letter confirming that the Union's initial proposal omitted wage and health

[11] Levine mistakenly referred to Tovitz' April 24 letter as April 23. (GC Exh. 15–17.)

[12] GC Exh. 18; Tr. 62–63.

[13] GC Exh. 19, 37–38; Tr. 52–54.

[14] Levine and Tovitz essentially agreed as to the substance of this conversation. (Tr. 35–36, 67, 87–88.)

[15] GC Exh. 20; Tr. 63–64.

[16] GC Exh. 21; Tr. 65.

[17] My findings as to what was discussed at the meeting were based on Levine's credible and unrefuted testimony. (Tr. 36–39.)

[18] As discussed previously in my analysis of the General Counsel's motion to amend the complaint to include additional allegations of the Respondent's failure to bargain beyond May 7, that motion was denied at trial. Accordingly, any references to subsequent bargaining or attempts to schedule bargaining after May 7, are for background purposes only. (Tr. 36–39, 49–50.)

insurance proposals. He also reiterated that the Respondent would not submit a counterproposal until the Union presented its "full economic proposal."[19]

On May 9, Levine responded by listing, in pertinent part, the specific information that the Union needed in order to complete its economic proposals and noting that the outstanding information not mentioned would be necessary in order to complete the negotiation process: dental Insurance Information; years of credited experience, total hours worked, overtime hours worked, weekend hours worked, and accrued sick time for each member; annual costs in 2006 and 2007 for overtime pay, holiday pay, vacation pay, tuition reimbursement, and continuing education costs; and number of registered nurses and licensed practical nurses budgeted for by the Respondent for 2008.[20]

On May 13, Tovitz sent Levine an executed MOU extending the contract through June 30, but disagreed with the assertion that the Union could not submit an economic proposal with the information already provided. He added, however, that "we are in the process of gathering additional information purportedly necessary for you to complete your initial proposals. We expect to have that information to you shortly."[21]

On May 20, Tovitz sent Levine three spreadsheets containing the following information: years of credited experience, accrued sick time balance, holiday and vacation pay for 2006 and 2007, overtime pay for weekends and holidays for 2006 and 2007, and all other overtime pay for 2006 and 2007. He also enclosed the dental insurance summary and addressed three other outstanding requests by stating that there had been no tuition reimbursement in 2006 and 2007, that the Respondent was unaware of any costs for continuing education in 2006 and 2007, and disclosing its workers' compensation costs for 2006 ($155,800) and 2007 ($192,754).[22]

On May 21, Levine replied to Tovitz' May 20 letter by submitting several questions concerning information already provided, but also listing information not yet provided: dental insurance; total hours worked on weekends in 2006 and 2007; and number of RNs and LPNs budgeted for by the Respondent for 2008.[23] On May 28, the Respondent provided information regarding dental insurance, total hours worked on weekends, number of RNs and LPNs budgeted by the Respondent for 2008, and employee contributions to medical plan and per diem employees.[24]

G. The Union Submits an Economic Proposal While Still Awaiting Information

On June 2, Tovitz asked Levine to provide the Respondent with its complete economic proposal prior to the June 11 bargaining session. On June 3, Levine sent Tovitz the Union's proposals relating to wages and health insurance and "professional practice issues." Levine also thanked Tovitz for the information provided with the May 28 letter, but noted that certain information requested on February 14, was still outstanding: the Union's premium costs and total employee hours worked on weekends. He also noted that "there is still important information that we have not received as per my April 30, 2008 letter:" the most recent quarterly financial report; the Respondent's 2006 IRS form 990; a current list of the NCC's board of directors; annual costs in 2006 and 2007 for overtime, holiday and vacation pay; the number of vacant positions in each job title as of January 1, 2007, and January 1, 2008; and annual cost and number of employees receiving the new hire bonus in 2006.[25]

At the bargaining session on June 11, Tovitz hand-delivered the Respondent's response to the Union's request for dental insurance premium rate information and the "most recent quarterly financial report for the first quarter of 2008."[26] However, the remaining information still had not been provided when the parties met again on June 27 and July 8.[27]

On July 17, Tovitz provided the remaining information: a list of vacation time carried over by the employees at the end of 2006 and 2007; the Respondent's cost for free prescription cards; estimated cost savings for increasing copay amounts; copies of 2007 and 2008 schedules; annual costs for overtime, holiday and vacation pay; vacant positions in 2007 and 2008; the number of employees receiving new-hire bonuses in 2006.[28]

III. LEGAL ANALYSIS

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act by failing: (1) beginning March 20, to provide the Union with requested information necessary and relevant to the performance of its duties as the collective-bargaining representative of the unit employees; and (2) from March 21 to May 7, failing to confer and meet at reasonable times with the Union. The Respondent insists the Union never proposed meeting dates prior to March 31, and that the Respondent's counsel, 1 day after being assigned to the case, agreed on April 15 to schedule a bargaining meeting for May 7. The Respondent also denies that it unreasonably delayed in providing the requested information and relies on the fact that it was provided prior to the issuance of the complaint.[29]

A. Failure to Provide Information

An employer has an obligation to furnish information in order to enable a labor organization to perform its duties as the collective-bargaining representative of its employees.

[19] GC Exh. 22.
[20] GC Exh. 23.
[21] GC Exh. 24.
[22] GC Exh. 25.
[23] GC Exh. 26.
[24] GC Exh. 27.
[25] GC Exh. 27.
[26] GC Exh. 31.
[27] The parties stipulated that, after the June 11 bargaining session, the parties met on June 22, July 8, August 7, September 4, and September 26. (Tr. 7.)
[28] The Union did not request any further information and the parties stipulated that, at the time of the hearing, all of the information sought on February 14, had been provided. (GC Exh. 33; Tr. 6–8.).
[29] R. Br., pp. 8–10.

NLRB v. Acme Industrial Co., 385 U.S. 432, 435–437 (1967). The applicable standard is whether there exists "a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative." *Bohemia Inc.*, 272 NLRB 1128 (1984). In reviewing whether the requested information is or was probably relevant to the union's role, the Board has typically applied a liberal discovery-type standard. *Brazos Electric Power Cooperative*, 241 NLRB 1016 (1979).

The relevant facts demonstrate that the Respondent simply ignored the Union's requests for information and to schedule a bargaining session for nearly 2 months. On February 14, 16 days after notifying the Respondent of its intention to modify the collective-bargaining agreement, with a copy to state and federal authorities, the Union submitted an information request to Clay, the Respondent's human resource director. The Respondent ignored the request, as well as a follow-up letter on March 21. The March 21 letter reminded Clay and Jasinski, the Respondent's labor counsel, that the current collective-bargaining agreement would expire on April 30, and requested negotiations commence as soon as possible. Levine indicated the Union's availability any day during the 2-week period commencing March 31. Clay and Jasinski ignored that letter and Levine emailed them on April 1. Clay replied shortly thereafter and assured Levine she would contact Jasinski and get back to Levine "immediately." A short while later, Clay asked Levine to send another copy of the February 14 information request, which he did. On April 2, Clay assured Levine that she would "begin pulling this information right away." On April 4, Levine attempted to contact Jasinski, but was unsuccessful and left a message. Jasinski did not return the call. On April 9, still not having heard from Jasinski, the Union filed the instant charge. On April 14, Tovitz was assigned as the Respondent's labor counsel and spoke with Levine on April 15. They agreed to schedule a meeting within the 3 weeks and Tovitz was to address the information request. On April 17, Tovitz confirmed that a bargaining meeting would be held on May 7, and an extension of the contract through May 31. He also assured Levine that the requested information would be forthcoming. On April 23, the Respondent provided a partial response to the information request—a chart setting forth the names of 20 employees, their rates of pay, hire dates, dates of birth, classifications, and status. On April 30, the Respondent provided additional information: a list of the bargaining unit employees containing total hours worked in 2007, total earnings in 2007, medical coverage (if any), monthly contribution rates, a list of the Respondent's board of directors, current health plan coverage, health insurance premium cost, dental coverage, and 2007 new-hire bonuses. On May 2, the Respondent provided the summary health plan description and a 2007 unaudited financial report. On May 6, the Respondent provided the Union with copies of bills indicating monthly health insurance costs to the Respondent.

The parties met on May 7, for a bargaining session. However, since the Respondent failed to provide the Union with a full response to the February 14 information request, the Union was unable to submit a complete proposal, especially as to the economic issues of wages and health insurance benefits. Still lacking at the time of that meeting was requested information relating to dental Insurance plans, years of credited experience, total hours worked, overtime hours worked, weekend hours worked and accrued sick time for each member; annual costs in 2006 and 2007 for overtime pay, holiday pay, vacation pay, tuition reimbursement and continuing education costs, and number of registered nurses and licensed practical nurses budgeted for by the Respondent for 2008. A further consequence of the Union's inability to prepare a comprehensive proposal because of the Respondent's unreasonable delay was the Respondent's refusal to submit a counterproposal.

On May 20, Tovitz sent Levine the following information: years of credited experience, accrued sick time balance, holiday and vacation pay for 2006 and 2007, overtime pay for weekends and holidays for 2006 and 2007, and all other overtime pay for 2006 and 2007. He also enclosed the dental insurance summary and addressed three other outstanding requests by stating that there had been no tuition reimbursement in 2006 and 2007, that the Respondent was unaware of any costs for continuing education in 2006 and 2007, and disclosing its workers' compensation costs for 2006 and 2007. As a result of the information received, the Union was able to submit proposals relating to wages and health insurance to the Respondent on June 3. At the subsequent bargaining session on June 11, the Respondent finally provided dental insurance premium rate information and the "most recent quarterly financial report for the first quarter of 2008." The parties met again for bargaining sessions on June 27 and July 8, but the remaining information was not provided until July 17: a list of vacation time carried over by the employees at the end of 2006 and 2007; the Respondent's cost for free prescription cards; estimated cost savings for increasing copay amounts; copies of 2007 and 2008 schedules; annual costs for overtime, holiday and vacation pay; vacant positions in 2007 and 2008; and the number of employees receiving new-hire bonuses in 2006.

Accordingly, by failing to provide the Union with all of the information requested on February 14, prior to the commencement of bargaining on May 7, the Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

B. Failure to Meet and Bargain in Good Faith

Section 8(d) of the Act requires an "employer and the representative of the employees to . . . meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . ." In determining whether a party has satisfied such a responsibility, the Board will look to the totality of the circumstances and not just the number of bargaining sessions ultimately held. *Garden Ridge Mgmt.,* 347 NLRB 131 (2006).

As previously explained, the Union notified the Respondent, through its human resources director, on January 29, that it would seek to modify the terms and conditions of the collective-bargaining agreement, which was due to expire on

April 30. The Respondent ignored that letter, as well as the February 14 information request. With time running out on the collective-bargaining agreement, Levine sent another letter to the Respondent and, this time, the Respondent's counsel on March 21. Levine reminded them that the agreement would expire on April 30, and urged commencement of negotiations as soon as possible and requested bargaining dates on any day during the 2-week period commencing March 31. He sent them an additional reminder on April 1, and finally received a reply from Clay. Clay, professing ignorance as to the existence of the February 14 information, asked Levine to resend it. Levine complied and Clay, in what could only be characterized as a hollow promise, assured Levine that she would begin gathering the information. However, not hearing from Jasinski about bargaining dates, Levine called Jasinski on April 4 and left a message. Jasinski never returned the call. However, Levine did get a call from Tovitz, an associate in Jasinski's law firm on April 14, or 5 days after unfair labor practice charges were filed and a mere 16 days before the expiration of the collective-bargaining agreement. They spoke on April 15, and agreed to schedule a meeting within the next 3 weeks.

While Levine and Tovitz agreed to schedule the meeting on May 7, the damage had already been done. The Union's reasonable request in March to meet during the first 2 weeks in April had passed and the Union was still attempting to obtain the information relevant to the development of its collective-bargaining proposals. The Respondent's actions in ignoring and then delaying the Union's requests for information virtually ensured that the May 7 bargaining session would be a meaningless exercise. The Union, lacking responses to its information request concerning wages and health benefits, was unable to present an economic proposal to the Respondent at that session. The Respondent, having ignored the economic portions of the Union's information request up to that point, responded there would be no counterproposal without a comprehensive union proposal. Under the circumstances, the Respondent's unreasonable delay in waiting until April 14, to respond to the Union's request to meet, as well as its failure to respond to the Union's February 14 information request prior to the May 7 bargaining session, violated Section 8(a)(5) and (1).

C. The General Counsel's Motion to Reconsider

The General Counsel moved to amend the complaint to allege that, beginning May 7, and continuing on an open ended basis thereafter, the Respondent failed to meet at regular times and bargain with the Union. I rejected the motion as untimely made during the course of the trial and, if granted, a development that was likely to prolong the trial, given the Respondent's right to a postponement of the trial.[30]

The proposed amendment appears somewhat related to the existing allegations, but in order to prevent undue prejudice to the Respondent, it was extremely likely that the trial would have been postponed in order for the Respondent to present an adequate defense. While the General Counsel is correct in noting that the Board Rule's, Section 102.17 permits complaint amendments "upon [terms that] may seem just," it would not be "just" under the circumstances.

The Regional Director signed the complaint on June 29, issued a trial date, which was rescheduled twice, and the case finally went to trial on October 7. Prior to trial, I held a conference call with counsel for the parties to discuss trial preparations and related issues. The General Counsel made no mention at that time of his intention to move to amend the complaint and he provided insufficient justification for such an amendment at trial. At footnote 10 of his brief, he now contends that limiting the failure to meet allegation to May 7, was a drafting error. Such an assertion, if accepted, would establish bad precedent, as it would enable the General Counsel to wait until trial to add charges and simply attribute it to some sort of oversight or law office neglect.

Moreover, the motion to reconsider is essentially superfluous given the aforementioned findings. The Respondent, during the period of March 21 to May 7, failed and refused to meet and bargain. More importantly, however, the Respondent's failure to timely provide requested information long before the contract's expiration on April 30 virtually ensured protracted bargaining after May 7. After May 7, the Respondent's continued failure in responding to the Union's February 14 information request made a bad situation even worse. In such a context, piling on additional allegations of the Respondent's failure to meet and bargain would not change the nature of the appropriate relief, as provided below in the order, remedy, and notice. Accordingly, the motion to reconsider is denied.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing, commencing March 20, 2008, to timely provide information requested by the Union in its letter of February 14, 2008, which was necessary for and relevant to the performance of the Union's duties as the exclusive collective-bargaining representative of the unit employees, the Respondent violated Section 8(a)(5) and (1) of the Act

4. By unreasonable delaying until April 14, to respond to the Union's request to meet and failing to respond to the Union's February 14 information request prior to the May 7 bargaining session, the Respondent violated Section 8(a)(5) and (1).

5. By engaging in the foregoing conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to

[30] In this regard, an objection to proposed GC Exh. 34–36 was sustained and they were placed in the rejected exhibit file. (Tr. 42–50; GC Br. at 11–13.)

effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[31]

ORDER

The Respondent, Essex Valley Visiting Nurses Association and New Community Corporation, a single employer located in Newark and East Orange, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Health Professionals and Allied Employees, Local 5122 by timely providing information that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of the Respondent's unit employees.

(b) Refusing to bargain collectively with the Health Professionals and Allied Employees, Local 5122 by failing and refusing to timely respond to the Union's requests to meet and bargain in good-faith bargaining for the purpose of negotiating a successor collective-bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, timely provide the Union with information that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining.

(b) On request, bargain in good faith with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time (including regular per diem) Registered Nurses and Licensed Practical Nurses employed by the Respondent EVVNA at its East Orange, New Jersey facility, but excluding all office clerical employees, managerial employees, confidential employees, guards and supervisors as defined in the Act, and all other employees.

(c) Within 14 days after service by the Region, post at its facilities in Newark and East Orange, New Jersey, copies of the attached notice marked "Appendix."[32] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 20, 2008.

(d) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix,[33] at its own expense, to all full-time and regular part-time (including regular per diem) registered nurses and licensed practical nurses who were employed by the Respondent at its East Orange, New Jersey facility at any time from the onset of the unfair labor practices found in this case until the completion of these employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 17, 2008

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL, on request, timely provide the Health Professionals and Allied Employees, Local 5122 with information that is relevant and necessary to its duties as the exclusive collective-bargaining representative of the Respondent's unit employees.

WE WILL, on request, bargain in good faith with the Health Professionals and Allied Employees, Local 5122 as the exclusive representative of the Respondent's unit employees by timely responding to the Union's requests to meet and bargain.

[31] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[32] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.

[33] Ibid.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

ESSEX VALLEY VISITING NURSES ASSOCIATION/NEW COMMUNITY CORP.